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Regulatory
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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-260 and 9 VAC 25-370
Regulation title	Water Quality Standards; Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters
Action title	Designate shellfish aquaculture enhancement zone on the Virginia Eastern Shore with provisions for an alternatives analysis of wastewater treatment for proposed point source discharges to the listed waters
Document preparation date	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The subject matter of the rulemaking will include a new designation of "Aquaculture Enhancement Zones" on the Eastern Shore of Virginia and narrative criteria to provide additional protection to these waters that are used or could reasonably be used for shellfish aquaculture or to support aquaculture by requiring applicants to demonstrate that practicable alternatives to discharging pollutants to the listed waters have been evaluated and that the proposed discharge is the alternative that produces the least environmental impact. The rulemaking will also consider how the shellfish policy in 9 VAC-25-370 and the water quality standards (e.g. shellfish public hearing requirements in 9 VAC 25-260-270) should be amended in order to consolidate water quality protection efforts for shellfish for the purposes of improving the clarity and efficiency of implementation of these related activities.

The intent of this rulemaking is to protect state waters by adopting regulations that are technically correct, necessary and reasonable to protect the aquaculture uses of the specified waters. These standards will be used in determining whether new point source discharges will be permitted and, if so, in setting Virginia Pollutant Discharge Elimination System Permit limits.

This rulemaking is needed to protect important shellfish habitat areas and the sustainability of Virginia's aquaculture industry by providing additional water quality protection for these waters on Virginia's Eastern Shore.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Federal and state mandates in the Clean Water Act at 303(c), 40 CFR 131 and the Code of Virginia in §62.1-44.15(3a) are the sources of legal authority identified to promulgate these amendments. The most relevant law is the Code of Virginia at §62.1-44.15(3a). The promulgating entity is the State Water Control Board.

The scope and objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Clean Water Act at 303(c) (1) requires that the states hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

The scope of the Federal regulations at 40 CFR 131 is to describe the requirements and procedures for developing, reviewing, revising and approving water quality standards by the States as authorized by section 303(c) of the Clean Water Act 40 CFR 131 specifically requires the states to adopt criteria to protect designated uses.

The scope and purpose of the State Water Control Law is to protect and to restore the quality of state waters, to safeguard the clean waters from pollution, to prevent and to reduce pollution and to promote water conservation. The State Water Control Law (Code of Virginia) at §62.1-44.15(3a) requires the Board to establish standards of quality and to modify, amend or cancel any such standards or policies. It also requires the Board to hold public hearings from time to time for the purpose of reviewing the water quality standards, and, as appropriate, adopting, modifying or canceling such standards.

The correlation between the proposed regulatory action and the legal authority identified above is that criteria and designated uses are requirements of the Water Quality Standards and the amendments being considered are modifications of criteria that will protect designated uses.

The authority to adopt standards as provided by the provisions in the previously referenced citations is mandated, although the specific standards to be adopted or modified are discretionary to the Environmental Protection Agency and the state.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

This rulemaking is needed to provide additional water quality protection for waters on the Eastern Shore of Virginia that are used or could be used for shellfish aquaculture.

The rulemaking is essential to the protection of health, safety or welfare of the citizens of the Commonwealth. Proper water quality standards protect water quality and living resources of Virginia's waters for consumption of fish and shellfish, recreational uses and conservation in general.

Potential issues that may need to be addressed are listed in the alternatives section.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

The proposed regulatory action will constitute an amendment of existing regulatory provisions. A special water quality standard will be proposed to provide extra protection for waters on both the Chesapeake Bay side and seaside of the Eastern Shore of Virginia designating these as "Aquaculture Enhancement Zones" and establishing requirements to conduct an alternatives analysis for proposed point source discharges.

All of the Eastern Shore waters that are appropriate for this special protection will be identified during the rulemaking process and included in a new 'special standard' under section 310 of the water quality standards regulation and listed as "Aquaculture Enhancement Zones" within the river basin section tables (9 VAC 25-260-520) of that same regulation. These "Aquaculture Enhancement Zones" would likely be an expansion of the waters already identified on the Eastern Shore as shellfish waters in 9 VAC 25-260-520 paragraphs 1 and 1b.

The "Aquaculture Enhancement Zones" special standard would describe additional requirements that apply to these waters. The special standard would require applicants for any proposed wastewater discharge to the listed waters to demonstrate that practicable alternatives to discharging pollutants to these waters have been evaluated and that the proposed discharge is the alternative that produces the least environmental impact. Flexibility would be provided to consider additional issues, such as cost, geographic restrictions, technological limitations and possible other issues identified during the rulemaking process. The special standard would include a provision that a proposed discharge of sewage, industrial waste or other pollution into the listed waters may not be allowed if a practicable alternative is available that produces less environmental impact. Requiring owners to demonstrate the need for a point source discharge would be consistent with the goal of the Clean Water Act of eliminating discharges to navigable waters of the U.S.

Under Code of Virginia § 62.1-44.19.B., "The Board shall approve such application if it determines that minimum treatment requirements will be met and that the discharge will not result in violations of water quality standards." Two sections in the Virginia Water Quality Standards currently provide for the board to deny an application for a new discharge: 9 VAC 25-260-30 (Antidegradation Policy) and 9 VAC 25-260-270 (Shellfish buffer zones; public hearing). The provisions in this special standard are considered consistent with this approach.

Success of this new approach for the VPDES permit program depends upon a concurrent strengthening of the on-site sewage disposal requirements to prevent shifting the pollution impact from surface water to ground water. Given the close connection between ground and surface waters on the Eastern Shore,

ground water pollution would ultimately impact the designated aquaculture waters, thereby undermining the objectives of this new program.

Consideration will also be given to amending 9 VAC 25-370, Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters, and the water quality standards (e.g. shellfish public hearing requirements in 9 VAC 25-260-270) in order to enhance management of the shellfish resource by integrating related activities.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

One alternative is to keep the current water quality standards regulation unchanged but this was not chosen because of the issues included in the "need" and "substance" sections. Each issue listed may have a more cost effective alternative or any individual issue may be accepted or rejected. The Department will solicit public input and consider other alternatives and issues presented by the public which also meet the goals of the regulation and of the agency.

Some alternatives considered by the Department include, but are not limited to, the following:

- Whether "Aquaculture Enhancement Zones" should be established to protect shellfish only on the Atlantic (seaside) of the Eastern Shore rather than all waters on the Eastern Shore.
- What criteria should be developed for selecting these waters for designation and the scope of any such designation.
- Whether to designate individual waters (water body by water body) rather than the more efficient approach of the agency designating in one rulemaking all of the waters suitable on the Eastern Shore as "Aquaculture Enhancement Zones."
- Whether 9 VAC 25-370, Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters, should be repealed and consolidated with 9 VAC 25-260-270 (Shellfish buffer zones, public hearing).
- Whether "permitted aquaculture sites" should be included in the definition of shellfish waters.
- Whether any of the approaches below identified by the agency should be considered as an alternative to the approach described in the "substance" section of establishment in the water quality standards regulation of a special standards designation of "Aquaculture Enhancement Zones" with identification of these waters in the river basin tables:
 1. Whether these "Aquaculture Enhancement Zones" could be given additional protection under the antidegradation policy of the water quality standards regulation (9 VAC 25-260-30). The existing antidegradation policy subsections A and B meet or exceed all federal requirements and should remain intact to match the federal regulation. A subsection C could be added that describes or defines the "Aquaculture Enhancement Zones" and lists the new requirements described in the "substance" section.

2. Whether these “Aquaculture Enhancement Zones” could be given additional protection under the shellfish buffer zones; public hearing section of the water quality standards regulation (9 VAC 25-260-270). Under this section, permits (called proposals in the regulation) to these waters must be disapproved if they cause a condemnation and violate the general criteria of the water quality standards (after public hearing and consultation with other natural resource agencies).
3. Whether these waters could be placed via rulemaking in an exceptional state water category (9 VAC 25-260-30) wherein no new discharges would be allowed.

Public Participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The Board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal including suggestions on appropriate evaluative elements for an alternatives analysis of practicable options to discharging pollutants to these waters, 2) the costs and benefits of the alternatives stated in this background document or other alternatives including socioeconomic benefits to the community from enhanced protection of the shellfish resource and retention of aquaculture related jobs for watermen and costs to commercial and residential development of an alternatives analysis for discharge of treated wastewater to shellfish waters, and 3) impacts of the regulation on farm and forest land preservation. The Board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so at the public meeting or by mail, email or fax to Jean W. Gregory, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240-0009, fax (804) 698-4116, email jwgregory@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period. Questions may also be directed to Ms. Gregory at phone number (804) 698-4113 or toll free in Virginia at (800) 592-5482 ext. 4113.

A public meeting will be held and notice of the meeting can be found on the Virginia Regulatory Town Hall web site. Both oral and written comments may be submitted at that time.

Participatory Approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The Board is using the participatory approach to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). Any persons who want to be on the advisory committee are encouraged to attend the public meeting mentioned above. The primary function of the advisory committee is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The direct impact resulting from the development of water quality standards is for the protection of public health and safety and the protection of water quality in surface waters which has only an indirect impact on families.